IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 781 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM N. MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ALI FAKHIR MAMAD DAFER - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR YOGESH S LAKHANI for Appellant(s) : 1,
MR HM PRACHHAK, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 23/08/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

Present Appeal arises out of the judgment and

order rendered by the learned Additional Sessions Judge, Jamnagar in Sessions Case No.77 of 1994 on 31st May, 1999. The appellant who was the accused before the Sessions Court came to be tried for the offence of murder of his wife Roshanben by setting her on fire after pouring kerosene over her at about 3.00 p.m. on 4th May, 1994 in their residential house at Dafervas, Behind Vora Boarding at Dhrol.

1.1 As per the prosecution case, the appellant and his wife Roshanben were staying at Dafervas, Behind Vora Boarding at Dhrol around the time of the incident. The brother and sister of the deceased were also staying in the vicinity. On the day of the incident, the appellant came home in a drunken condition. The deceased, therefore, rebuked him. As a result, he got annoyed and poured kerosene over the deceased and set her to fire. The deceased ran out of the house shouting for help. Hearing the shouts, brother of the deceased Haji Suleman rushed to help her and extinguished the fire. The deceased was then taken to Community Health Centre at Dhrol but because she had sustained extensive burns, she was referred to Irwin Group of Hospitals at Jamnagar. The police was informed and in turn, police came to the hospital, recorded the F.I.R. of the deceased while summoning the Executive Magistrate for recording the dying declaration. On the basis of the F.I.R., offence was registered and investigated. The Executive Magistrate also arrived and recorded dying declaration of the deceased. After proper investigation, the investigating agency, having found sufficient material against the appellant, filed chargesheet against him in the Court of J.M.F.C., Dhrol. However, since the offence registered against the appellant was triable exclusively by the Court of Sessions, the case was committed by

learned J.M.F.C., Dhrol to the Court of Sessions at Jamnagar and Sessions Case No.77 of 1994 came to be registered.

1.2 Learned Additional Sessions Judge framed charge at Exh.11. The accused – appellant pleaded not guilty to the charge and claimed to be tried. The prosecution led evidence and the learned Additional Sessions Judge, after recording the statement of the accused under Section 313 of the CrPC and hearing the learned advocate for the accused as well as the learned Public Prosecutor, came to the conclusion that the prosecution was successful in establishing the charge of murder against the accused – appellant. The learned Additional Sessions Judge sentenced the accused – appellant to undergo imprisonment for life and to pay fine of Rs.1,000/-, in default, to undergo Simple Imprisonment for six months. Aggrieved by the said judgment and order, the present appeal is preferred.

2. We have heard learned advocate Mr. Lakhani for the appellant and learned APP Mr. Prachhak for the State. We have been taken through the record and proceedings by both of them which is before us.

3. Learned advocate Mr. Lakhani has raised a contention that the Trial Court has committed an error in appreciating the evidence. The Trial Court has given undue weightage to the dying declaration made before the Executive Magistrate and the F.I.R. recorded by a police officer. Mr. Lakhani submitted that there is a chain of circumstances in form of contemporaneous record to indicate that the appellant was not involved in the incident.

3.1 Mr. Lakhani, in order to substantiate his contention, submitted that the case paper of Community Health Centre at Dhrol (Exh.64) contains an endorsement implicating the appellant which is made, admittedly, subsequently by the doctor. It is a clear case of interpolation as the ink is different. The explanation given by the doctor would not inspire confidence if Exh.64 is seen. Mr. Lakhani also submitted that the Refer Note given while sending the patient to Irwin Hospital at Jamnagar, the telephone message recorded by Dhrol Police (Exh.54) and the case papers at Irwin Hospital at Jamnagar (Exh.23) do not implicate the appellant. Mr. Lakhani submitted that Dr. Jacob who has recorded history in that case paper has not been examined at all. The history which is written down in the case paper (Exh.23) has interpolations and no explanation in that regard is tendered by the prosecution. There is no evidence to show that the deceased was in a fit mental state to give declaration when the F.I.R. was recorded and when the dying declaration was recorded by the Executive Magistrate. The deceased was given a sedative and, therefore, this would be important. Mr. Lakhani also submitted that except some parts of the face, the entire body of the deceased had sustained burns injuries, as per the medical evidence. The injured parts were applied medicine and were bandaged. If that is so, thumb impression could not have been obtained by the police officer as well as the Executive Magistrate who both claim to have taken thumb impression of the deceased. The thumb impressions which are found on the F.I.R. as well as the dying declaration are clear impressions of thumb and not smudged.

3.2 Mr. Lakhani submitted further that the above factors will not only affect the prosecution case in

respect of what is recorded by the doctors by way of case history but would have an impact on the dying declaration recorded by the Executive Magistrate as well as F.I.R. recorded by the police officer.

3.3 Mr. Lakhani, while drawing our attention to deposition of Dr. Bharat Patel and the Executive Magistrate, indicated that they are contrary to each other. Dr. Jani has stated in his deposition that the skin of the deceased was peeled off which should again have an impact on the prosecution case of the deceased having given thumb impression on the dying declaration.

3.4 Mr. Lakhani submitted that the place of incident is a small room where kerosene is found at only one place. If the incident had occurred in the manner in which it is alleged to have occurred, there would have been some indications at the place of incident in the form of sprinkling of kerosene at various places, some indications of resistance or scuffle which is totally absent. Mr. Lakhani submitted that pouring of kerosene would take some time, may be few moments, but that time would be sufficient for any person to make an attempt to flee from the place or at least to raise shouts for help. In the instant case, there is no evidence to this effect. The story emerging from the dying declaration, therefore, becomes improbable.

3.5 Mr. Lakhani submitted that the material witnesses have turned hostile to the prosecution case. The brother of the deceased, sister of the deceased, mother of the deceased and sister-in-law of the deceased have all turned hostile. Mr. Lakhani submitted that their depositions cannot be discarded simply because they have not supported the prosecution case. Whatever piece

of evidence is found to be truthful or reliable may be accepted by the court. Mr. Lakhani submitted that it emerges from the evidence of these witnesses that the deceased was a strong-headed lady, a little crack in the head and was a shirker. It also emerges from the evidence that there were no disputes between the appellant and the deceased and that the appellant was not in the habit of taking liquor. It also emerges from their evidence that the deceased had given an oral dying declaration to the effect that she had committed suicide herself. There is no reason for not believing this version of these witnesses who are close relatives of the deceased and, therefore, it cannot be said that the prosecution was successful in establishing the case against the appellant to the hilt. The case at least becomes doubtful and benefit ought to have been given by the Trial Court to the appellant – accused. Mr. Lakhani, therefore, submitted that the appeal may be allowed and the impugned judgment and order may be set aside.

4. Learned APP Mr. Prachhak has opposed this appeal. According to him, the relatives of the deceased appear to have been won over by the accused – appellant. Mr. Prachhak submitted that it is probably a social compulsion on the part of these witnesses that has prompted them to withdraw their support to the prosecution. Mr. Prachhak submitted that it has come in evidence that the sister of the deceased is married to the brother of the accused – appellant and, therefore, it is quite natural that these witnesses have taken a somersault.

4.1 Mr. Prachhak submitted that there are three oral dying declarations and two dying declarations in form of history written down by the doctor, the F.I.R. and the

dying declaration before the Executive Magistrate. Mr. Prachhak submitted that there are some discrepancies so far as the recording of case history by the doctors is concerned. Mr. Prachhak also submitted that the witnesses before whom oral dying declarations were made have also not supported the prosecution case but the F.I.R. as well as the dying declaration recorded by the Executive Magistrate are recorded by the officers concerned in ordinary course of their official business and no defects, which would go to the root of the dying declarations, are indicated. Mr. Prachhak submitted that no doubt an attempt is made to show that the deceased had sustained burns injuries all over the body including the thumb and, therefore, the thumb impression obtained on the dying declaration and the F.I.R. cannot be that of the deceased and, therefore, these two pieces of evidence would be rendered doubtful but according to Mr. Prachhak, that attempt is only an attempt because the police officer who recorded the F.I.R. (Mahmadhussain Ahmedbhai Malek) and the Executive Magistrate (Sumanlal Narbheram Aashra) have both, in terms, stated that medicine was not applied on the thumb nor was it bandaged and thumb impression was taken. Mr. Prachhak submitted that though Havaben (p.w.7) (Exh.31) has stated that her thumb impression was taken on the dying declaration, it seems to be a clear case of a bonafide mistake because her thumb impression was taken by the doctor on case papers for obtaining consent for treatment to the deceased and her version in respect of her thumb impression on the dying declaration, therefore, gets ruled out.

4.2 Regarding the evidence on consciousness and fit state of mind of the deceased, Mr. Prachhak submitted that both the Executive Magistrate as well as the police officer who recorded the F.I.R. have stated in their

deposition that they tested and were satisfied about the fit state of mind of the deceased and thereafter recorded the F.I.R. or the dying declaration, as the case may be. There is evidence of Dr. Patel who has certified that the deceased was conscious when the dying declaration was recorded. It has come in his evidence that after the dying declaration was recorded, the deceased was examined and he found her to be conscious. Mr. Prachhak submitted that it is, therefore, clear that the deceased was conscious and was oriented as per the say of the Executive Magistrate and the Police officer. Mr. Prachhak submitted that even the case papers indicate that the deceased was conscious around the time when the F.I.R. and dying declaration were recorded. As regards fit state of mind, Mr. Prachhak submitted that there is no specific endorsement by the doctor but satisfaction of the officer regarding the declaration may be accepted as sufficient because they are independent Government officers and reliance can be placed on their assessment of mental state of the deceased. In this regard, Mr. Prachhak relied on a decision in the case of **LAXMAN vs. STATE OF MAHARASHTRA reported in AIR 2002 SUPREME COURT 2973.**

4.3 Mr. Prachhak submitted that the Executive Magistrate and the police officer who recorded the F.I.R. are from Jamnagar whereas the deceased was from Dhrol and it is nobody's case that these officers were known either to the deceased or to the accused nor it is anybody's case that they have any axe to grind against the accused. Under the circumstances, their depositions may be accepted at face value. Mr. Prachhak submitted that it is also nobody's case that the deceased had any reason to falsely implicate the appellant and reliance may be placed on a declaration made by a person in whose face

death was gaping. Mr. Prachhak further submitted that the Trial Court has examined all these aspects and has recorded a conviction and this court may not interfere with the finding of the Trial Court and the appeal may be dismissed.

5. We have considered rival side contentions and have examined the record and proceedings from the angles suggested by rival sides.

6. From the record and proceedings, it is clear that the prosecution has examined, in all, 24 witnesses.

6.1 Dr. Chetan Biharilal Jani (Exh.27), Dr. Ashokbhai Laljibhai Vader (Exh.60), Dr. Bharat Ambalal Patel (Exh.76) are medical witnesses who had performed post-mortem, had given treatment and had certified the deceased to be conscious at the time of recording dying declaration respectively. Dr. Gulabrai Jethalal Solanki (Exh.22) is the Medical Officer who was working in the Casualty Department on 4th May, 1994 when the deceased was brought there at 6.10 p.m.

6.2 Sumanlal Narbheram Aashra (Exh.14) is the Executive Magistrate who recorded the dying declaration of the deceased which is at Exh.16 and Mahmadhussain Ahmedbhai Malek (Exh.58) is the Police Sub-Inspector who had recorded the F.I.R. Of the deceased which is at Exh.59.

6.3 Witnesses Hajibhai Sulemanbhai (Exh.25), Fatmaben Hajibhai (Exh.26), Mariamben, wife of Jumabhai (Exh.33), Khatijaben, wife of Suleman (Exh.35), Rahematben, wife of Nurmamad (Exh.57), Havaben Rahemanbhai (Exh.31) are close relatives of the deceased

who have not supported the prosecution case and are treated as hostile witnesses.

6.4 The dying declaration (Exh.16), panchnama of the place of incident (Exh.21), the medical case papers of the deceased (Exh.23), the post-mortem notes at Exh.30, the inquest panchnama (Exh.39), arrest panchnama of the accused (Exh.40), F.I.R. (Exh.59) are important pieces of documentary evidence on which reliance is placed by both the sides in support of their respective contentions.

7. Hajibhai Sulemanbhai (Exh.25) is the brother of the deceased. He says that the deceased was married to the accused about a year and a half prior to the incident. The appellant was engaged in labour work. He says that his house is located at a distance of about 100 feet from the house of the accused and the two houses can be seen from each other. He says that on the day of the incident, the deceased has not kept the meal ready. His sister (the deceased) was high-headed. The accused asked her about the meal. She told him to wash his hands and in the meantime, she would prepare the meal. His brother-in-law, therefore, moved out of the house and his sister poured kerosene over herself and set herself ablaze. She came out of the house in a burning condition and his brother-in-law tried to extinguish the fire with the help of a towel. He also rushed there and tried to extinguish the fire with the help of a quilt. He asked the deceased and was told that she has set herself ablaze. He took her to Dhrol Hospital without any further questioning and from Dhrol, shifted her to Irwin Hospital at Jamnagar. He says that he saw his sister coming out of the house in a burning condition while he was sitting on the threshold of his house and that his brother-in-law did not set her to fire.

7.1 This witness has been declared hostile. He admits that he would not be able to hear a talk which may transpire in the house of the accused. He says that when his brother-in-law came to his house in the afternoon of that day, he was sitting outside the house. His sister came out of the house in a burning condition after about 10 minutes of his brother-in-law going into the house. He admits, during cross-examination to the Public Prosecutor, that on seeing the deceased in burning condition, he himself, his wife Fatmaben, aunt Havaben and sister Mariam rushed to the spot. He denies to have stated before the police that he asked his sister Roshan as to what happened and she told him that “your brother-in-law has poured kerosene over me and has tried to kill me by setting me ablaze”. She also told that she had rebuked the appellant - accused for drinking and, therefore, the incident has occurred. The witness denies that the accused - appellant was in the habit of drinking liquor. He says that when he took Roshanben to the hospital, the accused was sitting with the child and was crying.

7.1.1 During cross-examination to the defense advocate, the witness says that the deceased was able to speak while she was at home and was not in a position to speak after she was taken to Dhrol hospital. He says that the deceased did not state anything before the doctor at Dhrol nor did the doctor ask her anything. He says that he was with the deceased till she died alongwith his wife and his aunt Havaben. He also says that while he was with the deceased neither the police nor the doctor nor the Magistrate recorded any statement of the deceased. The deceased and the accused were at good terms.

7.2 Witness Fatmaben Haji is examined at Exh.26. She says that the incident occurred around 3.00 p.m.. She and her husband saw Roshan in a burning condition and, therefore, they rushed there and her husband extinguished the fire by throwing a quilt on her. She says that on her husband asking Roshanben, Roshanben told him that she has set herself ablaze. She says that the deceased was strong-headed and was crack in head. She stated that Roshan did not state that her husband has set her to fire. She also says that there was no dispute between the accused and his wife on account of the accused drinking. This witness is also declared hostile. During cross-examination to the Public Prosecutor, she says that she does not know what has transpired between the deceased and the appellant – accused. She says that she has not stated before the police that Roshanben, on being asked, told that her husband Alimamad had come home drunk and on her asking him not to do so, he quarreled with her and poured kerosene over her from a container lying in the house and thereafter, set her ablaze and went away. During cross-examination to the learned advocate for the accused, she has stated that she was with the deceased till she died and neither police nor Executive Magistrate nor the doctor ever recorded any statement. The deceased had sustained burns all over her body.

7.3 Havaben Rahemanbhai is examined at Exh.31. She is the maternal aunt of the deceased. She has been declared hostile and during cross-examination to the Public Prosecutor, she denies to have stated before the police that Roshanben, on being asked, told that her husband had come home in a drunken condition and as a result, there was a quarrel and, therefore, the accused

poured kerosene on her and set her to fire and thereafter left. In cross-examination to the learned advocate for the accused, she has stated that while Roshanben was under treatment at Jamnagar, she was present. Roshanben was not in a position to speak and was unconscious and, therefore, the doctor told her to put her thumb impression on the dying declaration (Exh.23) and, therefore, she had put her thumb impression. She states that neither the police nor the Magistrate ever came to record statement of deceased Roshanben and that the deceased expired while she was unconscious.

7.4 Witness Rahemanbhai Jarar is examined at Exh.32. He is the uncle of the deceased. He says that on hearing that Roshan is burning, he rushed to her house and found Roshan in a burning condition and that his son had set out the fire. This witness is declared hostile and denies to have stated before the police that Roshan stated before Haji that her husband had come home drunk which resulted into an altercation and, therefore, the appellant – accused poured kerosene over her and set her to fire.

7.5 Witness Mariam Jumabhai (Exh.33) is the real sister of the deceased who is married to the elder brother of the accused. She has stated in her examination-in-chief that on the day of the incident, when the accused came home for lunch, the lunch was not ready. She says that her sister (the deceased) was a shirker and the accused had to skip his meals many a times. On the relevant day, she asked the accused to sit outside the house and she would prepare the meal and then Roshan set herself to fire. During cross-examination to learned Public Prosecutor, she denies the factum of the deceased having stated about the accused setting her to

fire. She also denies a suggestion that the deceased was conscious when she was in the hospital. She denies a suggestion that she is not supporting the prosecution case and is trying to help the accused as he is her brother-in-law (husband's younger brother).

7.6 Witness Nurmamad Saleman is examined at Exh.34. He is the brother of the deceased. He pleads total ignorance of the cause of the incident and is declared hostile. He denies to have stated before the police about the oral dying declaration been made by the deceased before his brother Haji.

7.7 Khatijaben Suleman is examined at Exh.35. She is the mother of the deceased. She says that the deceased told Haji that she had herself set herself to fire. She says that there were no disputes between the accused and the deceased. She is declared hostile and during cross-examination to learned Public Prosecutor, she denies to have stated before the police about the oral dying declaration being made by the deceased before Haji implicating the accused – appellant. She admits that her daughter Mariam is married to brother of the accused. She denies that she is not telling the truth because of this relationship.

7.8 Witness Saarbai Ismail is examined at Exh.36. She also does not support the prosecution case. She is the sister-in-law (brother's wife) of the deceased. She also denies during cross-examination to the Public Prosecutor, on being declared hostile, that she had stated before the police about her coming to know about the accused having set the deceased to fire.

7.9 Raziaben Sumarbhai (Exh.37) is another sister-

in-law of the deceased. She also does not support the prosecution case and is declared hostile and denies to have stated before the police that the accused had set the deceased to fire on account of dispute on the accused drinking liquor.

7.10 Witness Rahematben Nurmamad (Exh.57) is yet another sister-in-law of the deceased. She also does not support the prosecution case and denies to have stated before the police that Roshanben stated that her husband had poured kerosene over her and set her to fire.

8. The above are the witnesses who are close relatives of the deceased but have not supported the prosecution case and are declared hostile. These witnesses have gone to the extent of saying that the deceased was strong-headed, was a shirker and crack in the head. It is true that their depositions cannot be thrown overboard in entirety only because they have not supported the prosecution case. These depositions can be examined and whatever part is found reliable, can be accepted by the court while assessing the evidence. Simply because they have turned hostile, they cannot be branded as total liars and, therefore, it will have to be examined as to what would be the impact of the evidence of these witnesses on the case.

9. The other set of evidence which supports the prosecution case and about which severe criticism has been made by the learned advocate for the appellant has now to be seen. The medical case papers of the deceased at the Irwin Hospital, Jamnagar are produced at Exh.23 by Dr. Gulabrai Jethalal Solanki who has been examined at Exh.22. Dr. Solanki was the Medical Officer on the relevant day and the deceased was brought before him at

6.10 p.m. for treatment with a Refer Note from the Medical Officer, C.H.C., Dhrol. He says that he admitted the deceased to female ward of Dr. Dodia and started the treatment. He says that the case history was recorded by him at page no.3 of the case papers. Exh. 23 runs into 23 pages. Page 3 is the first case paper prepared by Dr. Solanki wherein the case history is recorded as “history by burns”. In the M.L.C. Refer note which was received with the patient from the Medical Officer of Community Health Centre at Dhrol, the history is recorded as “History of Burns about 90%”. At page 2 of the medical case papers (Exh.23), the case history is recorded but there are interpolations. What is not scored and what is left out to be read is “History of Burns today around 3.00 p.m., history of setting afire with kerosene at her home, then patient was taken to Dhrol hospital and then referred to IGH, Jamnagar.” It is also stated “no history of convulsion, no history of vomitting and no history of unconsciousness”. What is scored out from the history recorded reflects that the deceased was set to fire by her husband who was drunk. The part that is scored out has not been initialled by anyone. It transpires from the evidence that this history was recorded by Dr. Jacob who has not been examined by the prosecution and as such, who altered the original history, why and when are the questions that have remained unanswered, without any explanation coming from the prosecution side.

9.1 Heavy criticism was made by the learned advocate for the appellant in respect of Exh.64 which is the case paper prepared at the C.H.C., Dhrol by Dr. Vadher. In the case paper, initially the history of burns only is recorded. It is stated in the case paper that on examination, Burns superficial and deep burns on face,

chest (breast), abdomen, private area both extremities (upper and lower) and both sides and also on back and scalp about 90-95% burns. It is also stated that the patient was referred to IGH, Jamnagar. Thereafter, at the bottom, it is written “H/O Burns by her Husband”. This portion is written with a different pen but is initialled by the doctor. The learned advocate for the appellant submitted that this is written subsequently at the behest of someone. The doctor has also admitted that “history of burns by husband” was written with a different pen because the refill of the ball-pen stopped working while he was preparing the case paper. This clearly emerges from the deposition of Dr. Vadher who has been examined at Exh.60. It also appears from Exh.65 (the case papers) that the case history recorded was that of only burns and there is nothing to indicate involvement of the appellant in the incident. Refer note at page no.7 of Exh.23 also does not record a history involving the appellant.

9.2 A message was sent to the police by Irwin hospital authorities on the basis of which entry no.1 was made in the station diary at the police station at 5.00 p.m. There also, there is absence of history involving the appellant.

9.3 It was, therefore, heavily argued that this chain of circumstances starting from the point when the deceased was taken to Dhrol Community Health Centre till she died, renders the evidence shaky, unreliable and lacks explanation for the manipulations made thereunder. No reliance, therefore, should be placed on Exh.64 which endorsement is the first in point of time to show involvement of the appellant and which is pressed in service by the prosecution as one of the dying

declarations.

9.4 We find considerable force in what is argued before us in respect of these pieces of evidence. Exh.64 contains an endorsement of history of burns by husband but that endorsement appears to have been made subsequently. Dr. Vadher has tried to explain this by saying that the refill of the ball-pen stopped working and, therefore, he had to write this with another ball-pen. But then, this history is written at the bottom. He admits that when a patient comes, first the history is recorded and in Exh.64, only history of burns is recorded initially. Apart from this, in the medical case papers at Exh.23 on page 2, history is written, then there are some alterations made therein by scoring out certain words and adding certain other words. What is scored out implicates the appellant and what remains does not implicate the appellant. Admittedly, as per the present case, the history was recorded by Dr. Jacob who has not been examined. It is, therefore, not possible to know as to who, when and why made the alterations. The history on case paper (Exh.23) does not carry the case of prosecution any further to implicate the appellant. The alterations in the case paper remain a mystery. We may hasten to act that non-examination of Dr. Jacob has not gone unexplained. The prosecution appears to have made all attempts to lead evidence in this regard and it appears that Dr. Jacob has left service from Irwin Hospital and it was not possible to examine him and the case papers were, therefore, proved through Dr. Patel examined at Exh.76. This explanation emerges from the purshis given by learned Prosecutor before the Trial Court at Exh.77. It is, therefore, not possible to infer that Dr. Jacob has been deliberately not examined but we may observe that the evidence in form of case history

recorded in the medical case papers is not sufficient to connect the accused directly with the crime.

10. After the police was informed by the hospital authorities, it appears that P.S.I. Mahmadhussain Ahmedbhai Malek rushed to the hospital. He is examined at Exh.58. He is the person who has recorded the F.I.R. He says that on 4th May, 1994, he was on duty as P.S.I. In 'B' Division Police Station of Jamnagar city. His duty was in the investigation branch between 1300 to 2100 hours on that day. He received a message at 1905 hours from P.S.O. Jambha that Roshanben Alimamad has been brought to Irwin Hospital and, therefore, he should go, record her statement and make a report. He, therefore, went to the hospital, found that Roshanben was conscious and, therefore, he recorded her statement and took impression of right thumb after noting down her statement as stated by her. It is at Exh.59. The witness says that on 6th May, 1994, he was on duty between 0000 hours to 0800 hours. He received a message at 0015 hours about death of Roshanben and he, therefore, prepared inquest panchnama in presence of panch witnesses. The witness is cross-examined at length. He says that when he reached the hospital around 1930 hours, the nurse was present but the doctor was not present. On being asked whether in such cases, before recording statement, opinion of the doctor is required to be taken, he replied that the patient was fully conscious and, therefore, he did not try to have an opinion of the doctor. It emerges from his cross-examination that when he went there, the treatment was over and intravenous fluid was being given to the patient through her legs. He said that whole of the body of the patient was bandaged but the thumbs were open. There were no bandages on it, there was blackening of the thumb with slight burns but it was possible to

take thumb impression. He was asked whether the patient was asleep when he went there and he replied that she used to respond on being called. He states that he recorded the statement as per the say of the deceased. He says that the statement was written down by his writer whose name he does not remember. He denies the suggestion that he has not recorded any statement of Roshanben as reflected at Exh.59. He also denies that thumbs, fingers and entire hands were burnt and were bandaged.

10.1 The Executive Magistrate who recorded the dying declaration is Sumanlal Narbheram Aashra, examined at Exh.14. In his deposition, he has stated that he was working as Deputy Mamlatdar and Executive Magistrate at Jamnagar on 4th May, 1994 and recording dying declaration was part of his duty. On 4th May, 1994, he received a yadi from Jamnagar Police to record dying declaration at about 1945 hours at his residence. The said yadi, he has produced at Exh.15. He says that he went to the hospital and reached there at 8.05 p.m. He went to the ward of Dr. Dodia. He inquired of the nurse about the patient and the doctor. The doctor was not present and the nurse summoned the doctor who came at 8.45 p.m. He told the doctor that he has to record the dying declaration of Roshanben. The doctor examined Roshanben and told him that she is conscious and put an endorsement on the dying declaration. He says that he recorded the dying declaration, as per her say, in a question-answer form in his own handwriting and she told him that because of quarrel, her husband poured kerosene over her and set her to fire. The said dying declaration is produced by the witness at Exh.16. The witness says that the deceased was conscious and was in a position to speak and was properly responding to his questions. When he recorded

the statement, no one else was present. He gave a copy to the police and retained the original statement. The witness has been cross-examined. He has stated that the dying declaration (Exh.16) was recorded between 2045 hours to 2110 hours. The face of the patient was burnt. He does not remember if nose, lips, ears, eyelids were burnt. He does not remember whether hands were burnt or not, whether palms and fingers were burnt or not. The abdomen was burnt and except face, the body was under bandage. The witness says that the doctor did not make any note or endorsement in the medical case papers about having examined Roshanben. He does not know what was examined by the doctor of Roshanben. The doctor examined the patient in a second and told him that the patient is conscious and is able to make a statement. The witness says that after recording the dying declaration, he had told the doctor that his work is over. During cross-examination, the witness also said that the hands of the patient were under bandage but there was no bandage on the thumb. No medicine was applied on the thumb. There is no specific identification of the thumb mark but he has written beside the thumb mark that it is the RHT of Roshanben Alifakir Mamad. He denies a suggestion that the hands were bandaged and medicine was applied and, therefore, it was not possible to take thumb impression on Exh.16. He denies that the dying declaration is concocted.

10.2 In the context of the dying declaration, deposition of Dr. Bharat Patel (Exh.76) may be seen. He says that on 4th May, 1994,he was working as 2nd year resident doctor in the ward of Dr. Dodia. Dr. Jacob John was his junior doctor and he knows the handwriting. He says that the endorsement made on the margin of Exh.16 (dying declaration) was made by him and signed by him.

He says that when he made the endorsement, the patient was fully conscious. He says that he had examined her and had interrogated her also. He says that when the Executive Magistrate came to record the dying declaration, he had gone to have his dinner. He reached the ward at 8.40 p.m. on receiving the call. He inquired from the patient her name, checked her pulse and blood pressure, found that she was conscious and thereafter put the endorsement on Exh.16 (dying declaration). The Magistrate worked for about 25 minutes. Nobody was around the patient when the dying declaration was recorded. After completing his work, the Executive Magistrate informed him that the work is over and he, therefore, went to the patient, examined her and found that she was fully conscious and thereafter he attended to other duties. The witness says, after referring to Exh.23 (medical case papers), that the patient was conscious at 8.00 p.m. on 4th May, 1994 as per the endorsement made therein. He says that at 10.00 p.m. also, the patient was conscious as per the endorsement made in the case paper (Exh.23). On the next day, except burning sensation, there was no other complaint of the patient. The patient became unconscious at about 11.15 p.m. on 5th May, 1994 and then her condition worsened and she expired at 11.30 p.m. This witness is cross-examined at length. He admits that the history recorded by Dr. Jacob was not in his presence. He admits that the burns were superficial to deep burns and even simple burns on vital parts of the body are considered serious. In such cases, pain-killer medicine is given to patients to relieve them of pain. In the instant case, 'Fortwin' injection was given to the patient as a pain-killer. The said medicine is prepared out of opium. This medicine has impact on the functioning of heart and it increases cardiac load. The witness admitted that because of this

medicine, the patient may feel drowsy, may perspire and may have nausea. He also admits that because of the medicine, the patient may have delirium. The witness admits that skin of the patient was peeled off. He admits that in such cases, bandages are applied to protect the patient against infection but he does not remember whether in the instant case, bandages were applied to the patient or not. The witness says that when he examined the patient, the Magistrate was in the ward but he does not remember whether he was present throughout while the dying declaration was recorded as five years had passed in between. He said that when he put the endorsement, the earlier part of the dying declaration was recorded but he does not remember as to exactly how much part of first page of Exh.16 was recorded. He denies the suggestion that he had not put any endorsement. He also denies the suggestion that he had put the endorsement subsequently in collusion with the Executive Magistrate. He also denies the suggestion that the patient was unconscious and was not in a position to speak.

10.3 What we have before us are two dying declarations, first in the form of the F.I.R. recorded by P.S.I. Malek and the second in the form of dying declaration recorded by the Executive Magistrate. Both these dying declarations are assailed on the ground that the patient had sustained 95% burns all over the body except some part of the face and, therefore, thumb impression could not have been obtained. It is also assailed on the ground that the patient had become unconscious at the residence as per the say of the close relatives and never regained consciousness thereafter and, therefore, her dying declaration could not have been recorded. These dying declarations are also assailed on

the ground that the close relatives claim to have remained with the deceased till she died and no police officer or Executive Magistrate ever approached to record the statement or dying declaration. It is also contended that thumb impression of Havaben was taken on the dying declaration and, therefore, these dying declarations are concocted and cannot be relied on.

10.4 It is not possible to accept any of these contentions for the reason that it is not only the say of P.S.I. Malek or the Executive Magistrate that the deceased was conscious but it is supported by evidence of Dr. Patel and other contemporaneous record in the form of medical case papers. The medical case papers of C.H.C. at Dhrol as well as Irwin Hospital at Jamnagar reflect a record that the deceased was conscious till 11.15 p.m. on 5th May, 1994. There is a specific endorsement made at 8.00 p.m. and 10.00 p.m. on 4th May, 1994 that the patient was conscious and the F.I.R. as well as the dying declaration is recorded in between 8.00 p.m. and 10.00 p.m. This is so far as contemporaneous record is concerned.

10.5 Apart from this, there is direct evidence of Dr. Bharat Ambalal Patel at Exh.76 who had put the endorsement on the dying declarations. The evidence of Dr. Patel and Executive Magistrate Mr. Sumanlal Aashra is alleged to be inconsistent with each other but we do not find any inconsistency between the two. The Executive Magistrate has said that when he went to the hospital, the doctor was not present and was summoned by the nurse. Dr. Patel also says the same thing. Dr. Patel then says that after reaching the ward, he examined the patient and then put the endorsement on the dying declaration. The Executive Magistrate also says the same thing. The only

inconsistency between the two is that according to Dr. Bharat Patel, he took about five minutes to examine the patient whereas the Executive Magistrate says that the work was over within a second. This discrepancy, in our view, is of no significance at all. Witnesses tend to exaggerate or add embroidery to their version at times, out of fear of being disbelieved or being branded as an untrue witness. In this regard we may refer to decision in case of **STATE OF U.P. vs. ANIL SINGH (AIR 1988 SUPREME COURT 1998)**.

10.5.1 A doubt is also sought to be created on basis of an answer given by the doctor in his cross-examination that he had put the endorsement on the dying declaration where there was some writing on the first page. The doctor is not able to say which part was written. Obviously, endorsement of the doctor could not have been obtained on a blank paper. The dying declaration contains details of the person whose statement is recorded, where it is recorded etc. and in front thereof, the endorsement of the doctor is found in the margin. We have no reason to doubt the testimony of Dr. Patel or the Executive Magistrate Mr. Aashra. They are independent witnesses and nothing is shown to infer that they have an axe to grind against the accused.

10.6 So far as thumb impression on these two dying declarations is concerned, again we have no reason to doubt that these two independent witnesses would manipulate and concoct a dying declaration. Both of them have said that they have obtained thumb impression of the deceased. They have categorically stated that there were no bandages and no medicine was applied on the thumb. P.S.I. Malek has stated that left thumb was slightly burnt and blackened but thumb impression was possible to

be taken. Against this, it is argued that the entire body was burnt and bandages were applied. The medical evidence in this regard, even despite a close scrutiny, does not specifically reflect that even thumb were totally burnt or that the skin was peeled off or that they were put under bandages. The doctor has stated that upper extremities would mean both the hands and they were burnt. This is a general expression used by the doctor whereas the Executive Magistrate as well as P.S.I. Malek both have personally obtained thumb impression and they have obtained the thumb impression after considering whether thumb impression would be possible to be taken or not. They would be better persons to remember condition of the thumb of the deceased and, therefore, it cannot be said that because the doctor has opined that both the hands were burnt, even the thumbs were burnt and the dying declarations were concocted.

10.6.1 As regards the contention that dying declaration becomes doubtful in light of say of p.w.7 - Havaben that her thumb impression was taken by the doctor on dying declaration, we may observe that she has mistaken the medical case papers for dying declaration because she refers to dying declaration as Exh.23 which are, in fact, medical case papers and do contain thumb impression of Havaben on the endorsement for consent for treatment of the deceased. The contention, therefore, does not merit acceptance.

10.7 The evidence of close relatives of the deceased does not inspire confidence whatsoever. They have been declared hostile as they have not supported the prosecution case but they have gone to the extent of saying that the deceased was crack in head, that the deceased was high-headed, that she was a shirker and that

she became unconscious at the place and remained unconscious till she died. The last portion gets negatived by contemporaneous record of the hospitals to record that the patient was conscious till 11.15 p.m. on 5th May, 1994. The evidence of these witnesses, therefore, cannot be relied upon. The changed version of these witnesses has to be viewed from an admitted fact that they are relatives of the deceased so also of the sister of the deceased who is married to the brother of the accused. Their psychology has to be judged from their social compulsions. Suffice it to say that their version that neither police nor the Executive Magistrate ever recorded the statement or the dying declarations of the deceased does not inspire any confidence.

10.8 The argument that the deceased was administered sedative and, therefore, would not be in a fit state of mind to give dying declaration would be of no significance in light of the deposition of Dr. Patel. Again what is brought out in the cross-examination of Dr. Patel is a generalised effect of 'Fortwin' injections but the doctor has asserted that the patient was conscious and was not under delirium. P.S.I. Malek has also stated that she was responding to his questions and, therefore, he did not deem it necessary to wait for the doctor and obtain his opinion. There is no reason to doubt the capacity of P.S.I. Malek to assess the state of consciousness and fitness of mind of the deceased when he found that the answers that were given by the deceased were relevant. In this context, we may refer to the decision of the Apex Court in the case of **LAXMAN vs. STATE OF MAHARASHTRA reported in AIR 2002 SUPREME COURT 2973** where it is held that while recording the dying declaration what is essentially required is that the person who records the dying declaration must be

satisfied that the deceased was in fit state of mind. Certification by doctor is a rule of caution and that the certification of the doctor was to the effect that the patient was conscious and there was no certification that the patient was in a fit state of mind would be taking a hyper-technical view of the matter. In this context, we may refer to yet another decision of the Apex Court in the case of **MUTHU KUTTY AND ANOTHER vs. STATE BY INSPECTOR OF POLICE, T.N. reported in 2005 Supreme Court Cases (Cri) 1202** wherein also a view is taken that if the person recording the dying declaration is satisfied about the declarant's medical condition, then such a declaration will not be considered invalid solely on the ground that the doctor has not certified the condition of the declarant.

11. It was vehemently argued that the place of incident is a small room and there were no indications of any resistance or scuffle by the deceased. If the incident occurred in the manner in which it is alleged to have occurred, then there would have been some indication of violence or resistance in the form of sprinkling of kerosene etc. but kerosene is found to have spilled only at one place which would reflect that it is a case of suicide by pouring kerosene by the deceased on herself. It was also contended that the door of the house was open when the incident occurred. The deceased had undisputedly come out of the house in a burning condition. It was, therefore, contended that the deceased could have run out of the house when an attempt was made to pour kerosene over her and thereafter to set her to fire. That appears to have not happened which also makes the prosecution theory doubtful. It is not possible to accept these contentions. For accepting these contentions, the court would be required to make a

presumption or to draw an inference that there was no resistance by the deceased nor was there any attempt to save herself by fleeing from the place on basis of circumstances indicated. But that can be done provided that there is no other evidence to show as to how the incident had occurred. But in the instant case, there is evidence in the form of dying declarations by the deceased which are otherwise found to be reliable, trustworthy and legally acceptable. There is no eye-witness to the incident. The deceased was the best person to say how the incident had occurred which she has disclosed in her dying declarations before the Executive Magistrate and P.S.I. Malek. It is true that the kerosene was found to have spilled at only one place in the house but that by itself cannot lead to an inference that it was poured by the deceased herself for committing suicide. The deceased had no reason to falsely implicate the appellant. Their married life was only of a year and a half. The deceased had recently delivered a child and even as per the parents and close relatives of the deceased, there was no dispute between the deceased and the appellant. Therefore, there is no ostensible reason for the deceased to falsely implicate her husband – the appellant, when she was nearing the deadline of her life.

11.1 As regards want of resistance, we may also observe that the appellant had marks of injury on his person when he was arrested. That panchnama is at Exh.40. The panchnama indicates that the appellant had burns injuries on his knees, burns injuries on left wrist where the skin was peeled off. There was a CLW on back and a bleeding injury on head. This panchnama is brought on record on admission by the accused. The case of the accused – appellant has been that he sustained burns injuries on his hands while trying to extinguish the

fire. In his statement under Section 313 also, he has referred to injuries on his hands and legs but not to injuries on his back and head. It is nobody's case that he sustained these injuries before the incident or after the incident. On the contrary, he admits to have sustained injury on hands and legs while trying to extinguish the fire. Finding of these injuries is very significant so far as the contention regarding want of resistance is concerned and it deters us from accepting the same.

12. The conduct of the appellant is also relevant. After the incident, the appellant surrenders to police on 6th May, 1994. So during 4th, 5th and 6th, he was absconding. Of course, abscondance part is denied by the appellant is his statement under Section 313 but the fact remains that he was not in the hospital with the deceased although in his statement he has claimed to have been with the deceased. If he was with the deceased in the hospital and he had sustained burns injuries, then he also would have been treated by the doctor as has been done after his arrest. The appellant has, in his statement under Section 313, claimed to have taken possession of the dead body after post-mortem and performed the burial ceremony but we are unable to find any material on record to appreciate as to who was the person who was handed over the possession of the dead body. No question is put to any of the witnesses in this regard either by the prosecution or by the defense except a question to the Investigating Officer Vikramsingh Gagubha Jadeja (Exh.66) where he says that he is not sure whether the appellant performed the burial ceremony of the deceased but he denies a suggestion that the appellant was not absconding. Be that as it may. The fact remains that the appellant, even as per the say of

close relatives of the deceased who have not supported the prosecution case, did not accompany the deceased to the hospital and he stayed at home with the child crying and surfaced thereafter only at the time of the arrest.

13. So far as the contention regarding non-examination of Dr. Jacob and other discrepancies found in the medical case papers, having direct impact on the dying declaration and the F.I.R., is concerned, the same cannot be accepted for the reason that the record maintained by the hospital is independent of what is recorded by the Executive Magistrate and the police and cannot be accepted to have any bearing on each other.

14. We find that the dying declaration recorded by the Executive Magistrate and the F.I.R. recorded by P.S.I. Malek which also has to be treated as a dying declaration clearly implicate the appellant and the doubts sought to be created in either their execution or in the truthfulness of version given by the deceased do not inspire any confidence and are not worth acceptance. The conviction recorded by the Trial Court, therefore, has to be upheld. We have gone through the judgment and order of the Trial Court impugned in this appeal. By and large, we agree with the reasoning adopted by the Trial Court and fully with the conclusion arrived at by the Trial Court. The conviction, therefore, has to be upheld while dismissing the appeal. The appeal, therefore, stands dismissed. The judgment and order dated 31st May, 1999 rendered by learned Additional Sessions Judge, Jamnagar in Sessions Case No.77 of 1994 stands confirmed.

15. Before parting, we may refer to the jail remarks just produced by learned APP which shows that after the conviction of the appellant on 31st May, 1999, the

appellant was granted furlough for 14 days on 2nd August, 2001. He absconded while on furlough and came to be arrested after 1130 days in the year 2004. It also appears that during this period, he is involved in as many as 13 offences spread over various districts of the State. In one of the cases, he has been convicted by the Chief Judicial Magistrate, Junagadh for an offence under Arms Act and is sentenced to undergo imprisonment for three years by order dated 21st July, 2006.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

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